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No. 97-1929

In the Supreme Court of the United States

OCTOBER TERM 1997

STATE OF MONTANA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency (EPA) violated Section 1377(e) of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, which requires EPA to develop and implement "final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter," 33 U.S.C. 1377(e), by determining that the respondent Tribes should be authorized to establish water quality standards for non-Indian fee lands as well as Indian lands within the Flathead Reservation, based on a determination that water pollution from nonmember activities on non-Indian lands would have serious and substantial impacts on the health and welfare of the Tribes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 137 F.3d 1135. The opinion of the district court (Pet. App. 16a-49a) is reported at 941 F. Supp. 945.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. The petition for a writ of certiorari was filed on May 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress has authorized the Environmental Protection Agency (EPA) to treat Indian Tribes in the

same manner as States for certain purposes of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and has directed EPA to promulgate regulations "which specify how Indian Tribes shall be treated as States" for those purposes. 33 U.S.C. 1377(e) (Pet. App. 132a-133a). Following notice and comment, the EPA promulgated regulations that provide a mechanism for Tribes to receive "treatment as a State" (TAS) authority. See 40 C.F.R. 131.8 (Pet. App. 113a-117a). The Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSK Tribes) applied for and received TAS authority under those regulations. Pet. App. 50a-91a. Petitioners, the State of Montana and local governmental entities, brought this action in the United States District Court for the District of Montana to obtain a declaratory judgment that EPA's grant of TAS status to the Tribes is unlawful. The district court rejected petitioners' assertions that EPA's decision is invalid as a matter of law, *id.* at 16a-49a, and the court of appeals affirmed, *id.* at 1a-15a.

1. The CWA is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). To achieve those goals, the CWA establishes a partnership between the federal government and the States in which the States have "primary responsibilities and rights" to regulate water pollution. 33 U.S.C. 1251(b); see 33 U.S.C. 1370; *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). As we explain below, Congress has also extended this partnership to Indian Tribes by providing, through Section 1377(e) of the CWA, that Indian Tribes satisfying prescribed criteria are eligible

for treatment in the same manner as States for certain purposes under the CWA. See 33 U.S.C. 1377(e).

a. As part of its regulatory program, the CWA provides that each State must adopt water quality standards for all waters within the State's jurisdiction and submit those standards to EPA for approval. 33 U.S.C. 1313(c). States must specify one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, fish propagation, or agriculture) and must establish water quality criteria to protect those uses. 33 U.S.C. 1313(c)(2)(A). EPA reviews all new or revised state water quality standards for consistency with the requirements of the Act. 33 U.S.C. 1313(c)(3). If EPA determines that a state standard does not meet minimum federal requirements, then EPA disapproves the standard. The State may then adopt changes suggested by EPA, or failing such action, EPA must itself issue a water quality standard for the State. 33 U.S.C. 1313(c)(3) and (4)(A).

In addition to water-quality based requirements, the CWA also provides for technology-based requirements, which take into account the capability of existing pollution-control technologies to remove particular pollutants from effluents. EPA or the State may establish effluent limitations, reflecting technology-based requirements for discrete categories and classes of point sources, that restrict the quantities, rates, and concentrations of specified pollutants that may be discharged into water from the point sources. See 33 U.S.C. 1311, 1342.

Both water quality-based and technology-based requirements are implemented through a permit process, known as the National Pollutant Discharge Elimination System (NPDES). The Act prohibits "the discharge of any pollutant" into the nation's waters except as au-

thorized by an NPDES permit. 33 U.S.C. 1311, 1342; see *EPA* v. *California*, 426 U.S. 200, 205 (1976). All NPDES permits must include effluent limitations (*i.e.*, restrictions on qualities, rates, and concentrations of discharged pollutants) that require the permittee's adherence to technology-based standards and, where applicable, more stringent water quality-based limitations designed to ensure that the receiving waters attain and maintain state water quality standards. See 33 U.S.C. 1342(a)(1); 40 C.F.R. 122.4(d); *Arkansas*, 503 U.S. at 104-107.

b. Federal law generally prohibits States from exercising regulatory authority on Indian lands unless Congress has authorized such action. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 & n.18 (1987). As originally enacted, the CWA did not specifically identify any non-federal governmental entity that had authority to set standards for waters on Indian lands within States. Congress amended the CWA in 1987 to provide that EPA may treat qualifying Indian Tribes in the same manner as States for the purposes of, inter alia, setting water quality standards for surface waters within the exterior boundaries of their reservations. 33 U.S.C. 1377(e). See Water Quality Act of 1987, Pub. L. 100-4, Tit. V, § 506, 101 Stat. 76. Section 1377(e) states that EPA is authorized to "treat an Indian Tribe as a State" for the purposes of 33 U.S.C. 1313 if:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian Tribe,

> held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of any Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. 1377(e). The term "Federal Indian reservation" is defined for those purposes to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. 1377(h)(1). Section 1377(e) directs EPA to promulgate regulations "which specify how Indian tribes shall be treated as States for purposes of this chapter" and to provide a mechanism for resolving disputes between States and Indian Tribes located on common bodies of water. 33 U.S.C. 1377(e).

2. In accordance with Section 1377(e)'s directions, EPA has promulgated regulations for the treatment of Indian Tribes in the same manner as States. See 40 C.F.R. 131.8 (Pet. App. 113a-117a). EPA's regulations set out four criteria, embodying the statutory requirements of Section 1377, that an applicant must meet to receive TAS authority. See 40 C.F.R. 131.8(a) (Pet. App. 113a-114a).

First, the applicant must be a federally recognized Indian Tribe that exercises governmental authority over a federal Indian reservation. 40 C.F.R. 131.8(a)(1), 131.3(k) and (l); compare 33 U.S.C. 1377(e)(1) and

(h). Second, the Indian Tribe must have a governing body that carries out "substantial governmental duties and powers." 40 C.F.R. 131.8(a)(2); compare 33 U.S.C. 1377(e)(1). Third, the water quality standards program that the Indian Tribe seeks to administer must pertain to the management and protection of water resources that are on Indian lands or otherwise within the borders of the Indian reservation. 40 C.F.R. 131.8(a)(3); compare 33 U.S.C. 1377(e)(2). Fourth, the Indian Tribe must reasonably be expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and the relevant regulations. 40 C.F.R. 131.8(a)(4); compare 33 U.S.C. 1377(e)(3).

EPA's regulations also set out the procedural requirements that Indian Tribes must follow to apply for and obtain TAS authority. 40 C.F.R. 131.8(b) and (c) (Pet. App. 114a-117a). The Tribe must submit a detailed application to the EPA Regional Administrator demonstrating that the Tribe satisfies the prescribed criteria for TAS status. 40 C.F.R. 131.8(b). The Regional Administrator provides notice of a Tribe's application to all appropriate governmental entities and allows 30 days for the submission of comments on the Tribe's assertion of authority. 40 C.F.R. 131.8(c)(2)(ii)and (c)(3). The Regional Administrator then determines, based on the Tribe's application and public comments, whether the Tribe "has adequately demonstrated that it meets the requirements" for treatment in the same manner as a State. 40 C.F.R. 131.8(c)(4).

EPA's regulations do not specifically address when a Tribe may exercise authority pertaining to water resources that pass through or are adjacent to lands owned by nonmembers in fee within the borders of an

Indian reservation. That issue arose, however, in comments during the rulemaking. See 56 Fed. Reg. 64,876 (1991). See Pet. App. 97a. EPA observed in the preamble to the final regulations, in response to those comments, that the Supreme Court had recognized that an Indian Tribe may have "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Pet. App. 98a, quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981). EPA therefore decided that, in implementing Section 1377(e), it would examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. App. 98a.

EPA stated that "the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis," Pet. App. 99a, and the "extent of such tribal authority depends on the effect of th[e] activity on the tribe," *id.* At 100a. EPA determined that, as a matter of prudence and in light of uncertainty over the scope of Indian authority over nonmembers, it would proceed for the time being on the premise (which EPA termed an "interim operating rule") that the Tribe should be required to show that the "potential impacts of regulated activities on the tribe are serious and substantial." *Id.* at 101a. But EPA also observed that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare." *Ibid.* It ultimately concluded that "[t]he determination as to whether the required effect is present in a particular case depends on the circumstances." *Ibid.*

3. The CSK Tribes applied to EPA for TAS authority for the purpose of developing water quality standards for all surface waters within the boundaries of the Flathead Reservation in Montana. See Pet. App. 17a. Those waters supply domestic, industrial, recreational, and agricultural uses, and support fish and other wildlife, on land within the Reservation. After seeking comments from Montana and other appropriate governmental entities, EPA issued a decision that approved the CSK Tribes' application and authorized the Tribes to administer a water quality standards program for all surface waters within the boundaries of the Reservation, *id.* at 50a-91a, including waters on or adjacent to fee lands, *id.* at 62a-68a. EPA based its decision on specific findings respecting the impact of water pollution on tribal health and welfare, including the impact from non-member activities on fee lands within the Reservation. See *id.* at 62a-68a, 70a-91a. EPA has since approved the water quality standards submitted by the Tribes, which are similar to those that the State of Montana has set for waters within its jurisdiction. *Id.* at 18a & n.1. In accordance with 33 U.S.C. 1341(a) and the CSK Tribes' TAS status, EPA will not issue an NPDES permit for a point source discharge within the Reservation if the CSK Tribes deny certification that the discharge will comply with the Tribes' water quality standards.

4. Petitioners filed a complaint under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging EPA's decision to grant the CSK Tribes TAS status. Pet. App. 19a. Petitioners contended that EPA erred as a matter of law in granting the Tribes TAS status because the agency's decision rested on a mistaken understanding of this Court's cases describing the scope of a Tribe's authority over

the activities of nonmembers who occupy fee lands within the Reservation. *Id.* at 20a. The district court granted summary judgment to EPA and the Tribes, finding that "EPA's final decision is supported by the administrative record, consistent with EPA's regulations, and not contrary to law, and should be upheld." *Id.* at 48a.

5. The court of appeals affirmed. Pet. App. 1a-15a. The court rejected what it described as petitioners' "facial challenge" to EPA's regulations. Petitioners argued that "the regulations permit tribes to exercise authority over non-members that is broader than the inherent tribal powers recognized as necessary to self-governance." *Id.* at 3a, 4a. In particular, the court of appeals explained, petitioners' "position in the district court and in this court has been that EPA got the scope of inherent authority wrong, and that the Tribes should be able to engage in nonconsensual regulation of non-tribal entities only when all state or federal remedies to alleviate threats to the welfare of the tribe have been exhausted and have proved fruitless." *Id.* at 10a. The court of appeals concluded that petitioners' argument rested on a misreading of this Court's decisions in *Montana* v. *United States*, *supra*, *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, *supra*, and *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404 (1997). Pet. App. 11a-13a. The court of appeals "affirm[ed] the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id.* at 13a.

ARGUMENT

The petition for a writ of certiorari should be denied because (1) the petition seeks review of an issue that was not briefed or decided below; (2) the court of appeals correctly decided the issue that was before it; and (3) the court of appeals' decision does not conflict with any decision of another court of appeals or otherwise present an issue warranting this Court's review.

1. The sole question presented in the petition for a writ of certiorari is whether an Indian Tribe has "inherent regulatory authority over a State and its local governments with respect to discharges into streams and other bodies of water from fee-owned land within the exterior boundaries of the tribe's reservation." Pet. i. The body of the petition, however, devotes less than two pages to that question, see Pet. 18-19, and that question does not fairly reflect the issue that petitioners appealed, the parties briefed, and the court of appeals decided.

This case arose from EPA's decision to grant the CSK Tribes TAS status, in accordance with Section 1377(e) of the CWA and EPA regulations implementing that provision, for purposes of establishing water quality standards for water resources within the Tribes' Reservation. See Pet. App. 17a-19a, 50a-91a. Petitioners have not challenged EPA's basic determination that, when considering whether Indian Tribes should have TAS status for the purpose of setting water quality standards for waters that flow through or adjacent to fee lands within the Reservation, EPA will use as its benchmark this Court's decisions in *Montana* v. *United States*, 450 U.S. 544 (1981), and subsequent cases, which describe the general principles defining the scope of a Tribe's authority in other settings to

regulate the activities of nonmembers on fee lands within the Tribe's reservation. See *Montana*, 450 U.S. at 565-566; see also *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997); *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 429-430 (1989) (plurality opinion).

The Court's decision in *Montana* recognizes that Tribes as a general rule lack inherent authority to regulate nonmembers, but that the rule is subject to important exceptions. In particular, the Court stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. EPA has concluded from that passage, and its application in subsequent Supreme Court decisions, that a Tribe may exercise inherent civil regulatory authority over the activities of nonmembers within a reservation if the direct effects of the activities "on the political integrity, the economic security, or the health or welfare of the tribe" are "serious and substantial." Pet. App. 63a. Pursuant to its decision to apply that same general approach in determining whether and to what extent an Indian Tribe should be treated as a State pursuant to the express statutory authorization in 33 U.S.C. 1377(e), EPA concluded in this case that the CSK Tribes should be permitted to set water quality standards under the CWA that would apply to waters that pass through or are adjacent to fee lands within their Reservation. EPA specifically found, based on detailed evidence in the administrative record, that the water pollution from non-member activities on

those lands would have serious and substantial impacts on the health and welfare of the Tribes. Pet. App. 70a-91a.

Petitioners have not challenged EPA's finding of serious and substantial impacts,[1] or argued that EPA's treatment of the CSK Tribes as a State with respect to lands owned by nonmembers should have been narrower in scope. Instead, they have consistently contended—in the administrative proceedings (Pet. App. 64a-65a), in the district court (*id.* at 42a-43a), and in the court of appeals (*id.* at 10a-11a)—that EPA has misinterpreted *Montana*, *Brendale*, and related decisions. Petitioners have specifically argued that "the *Brendale* decision effectively repudiated the *Montana* standard." Pet. App. 10a-11a. See *id.* at 42a. EPA, the district court, and the court of appeals have all unanimously rejected that argument. See *id.* at 10a-13a, 42a-46a, 64a-65a.

Thus, the question petitioners present in this Court, which suggests that the court of appeals granted the CSK Tribes broad authority to regulate state and local governmental activities, does not accurately depict the quite different issue decided below. The court did not frame the issue as whether the CSK Tribes were entitled to exercise "regulatory authority over a State and its local governments." Pet. i. Indeed, the courts below understood that EPA has retained responsibility for issuing NPDES permits, and EPA has not yet taken

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[1] The State submitted no data to EPA to rebut the CSK Tribes' showing of serious and substantial effects on tribal interests. Pet. App. 63a-64a.

any action to enforce permitting requirements on nonmember fee lands. See Pet. App. 5a, 21a-22a.[2]

2. a. The court of appeals correctly decided the issue that was before it. The CWA leaves no doubt that Congress intended to authorize EPA to treat an eligible Tribe in the same manner as a State with respect to lands owned in fee by non-Indians within the Tribe's reservation. Thus, Section 1377(e)(2) provides that Indian Tribes may qualify for treatment "as a State" for certain CWA purposes, not only with respect to land held by or on behalf of the Tribe or its members, but also with respect to land that is "otherwise within the borders of" the Tribe's "reservation." 33 U.S.C. 1377(e)(2).[3] Congress accordingly recognized, in enacting the

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[2] The court of appeals had no occasion to address the permitting issues because they are not ripe. In addition, the court of appeals had no reason to address petitioners' distinction between governmental entities and other nonmembers because petitioners did not raise it in their motion for summary judgment and they therefore did not properly preserve that distinction for purposes of appeal. See Federal Appellees' C.A. Br. 42 n.20; see Pet. App. 9a (stating that petitioners "opposed granting the Tribes TAS status to the extent such status would extend to reservation lands and surface waters owned in fee by non-members of the Tribe").

[3] Moreover, Section 1377(h) defines the term "Federal Indian reservation" to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. 1377(h). This definition is essentially the same as the description of a reservation in the definition of "Indian country" in 18 U.S.C. 1151, which the Court has consistently held, prior to the enactment of Section 1377 in 1987, "include[s] lands held in fee by non-Indians within reservation boundaries." *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984); see, *e.g.*, *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962); *United States* v. *Mazurie*, 419 U.S. 544, 555 (1975); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463,

Water Quality Act of 1987, that a Tribe's "management and protection of water resources" (33 U.S.C. 1377(e)(2)) could extend to waters that run through or adjacent to fee lands within the reservation, and EPA reasonably looked to this Court's decisions for guidance on the question of when it should authorize Tribes to exercise authority affecting nonmember activities on fee lands. Pet. App. 62a. The court of appeals sustained EPA's application of the principles of *Montana* and its progeny, under which EPA has authorized a Tribe to administer a water quality standards program that includes the activities of nonmembers within the Reservation if the direct effects of the activities "on the political integrity, the economic security, or the health or welfare of the tribe" are "serious and substantial." *Id.* at 62a-63a. Cf. *Brendale*, 492 U.S. at 431 (impacts must be "demonstrably serious") (plurality opinion).

b. Petitioners argue that, in accepting EPA's application of the *Montana* line of cases, the court of appeals failed to give appropriate weight to this Court's decisions in *Strate* and *Brendale*. Pet. 10-16. There is no merit to that argument. Those cases provide instructive guidance on how to apply *Montana* in particular contexts involving inherent authority, but—contrary to petitioners's suggestion— they do not alter *Montana*'s basic test for assessing whether a Tribe may exercise authority over a nonmember on fee lands, much less suggest that EPA's administrative decision applying the general principles of *Montana* on

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478-479 (1976). For that reason, the basic thrust of petitioners' position—that EPA is essentially barred from treating a Tribe as a State under the CWA with respect to reservation lands owned in fee by non-Indians—cannot be squared with the well-understood language Congress chose to use in authorizing EPA to confer certain responsibilities on Tribes under Section 1377.

the record before it in implementing an Act of Congress should be set aside under the APA's deferential standard of review. Indeed, *Strate* identified *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers" and affirmed the *Montana* test verbatim. 117 S. Ct. at 1409. Justice White's plurality opinion in *Brendale* also acknowledged the *Montana* test, suggesting additionally that the Tribe may exercise authority over nonmembers only if the impact on the identified tribal interests is "demonstrably serious." *Brendale*, 492 U.S. at 431. In this case, EPA found that the impacts are "serious and substantial." Pet. App. 70a-91a.

c. Petitioners also make a more specific argument —that *Strate* and *Brendale* place an implicit limitation on tribal authority over nonmembers based on the availability of non-tribal remedies. According to petitioners, those cases, coupled with a footnote in the *Montana* decision (450 U.S. at 566 n.16), indicate that *Montana* allows a Tribe to exercise authority over nonmembers only if there is no state or federal remedy available to protect the particular tribal interest at issue. See Pet. 13-17. The court of appeals correctly rejected that argument, which finds no support in *Montana*, *Brendale*, or *Strate*. Pet. App. 10a-12a.

Montana addressed the question whether Indian Tribes have inherent authority to regulate nonmember fishing and hunting on fee lands within a reservation. 450 U.S. at 547. The Court determined that the Tribe lacked that authority in the circumstances presented because the Tribe failed to show that the nonmember activity would harm the Tribe's political or economic security in the sense that the activities threatened the "subsistence or welfare of the Tribe." *Id.* at 566. The Court observed, in a footnote, that the Tribe also did

not allege that the State had misused its regulatory authority to the detriment of the Tribe. *Id.* at 566 n.16.[4] Contrary to petitioners' suggestion (Pet. 13), that footnote merely indicates that the State's failure to manage nonmember activities may itself create a threat to the Tribe's political integrity, economic security, or health or welfare that would warrant a Tribe's taking regulatory action. See *Lower Brule Sioux Tribe* v. *South Dakota*, 104 F.3d 1017, 1023 (8th Cir.), cert. denied, 118 S. Ct. 64 (1997). It does not by its terms or by any reasonable implication indicate that "a tribe's recourse normally lies in pursuing available state and federal remedies to mitigate the alleged infringement on tribal interests" (Pet. 13).

Petitioners are also mistaken in suggesting that the Court's decision in *Brendale* modifies the *Montana* test by adding the requirement that the adequacy of state or federal remedies must be considered in determining the scope of inherent tribal authority. See Pet. 11-13, citing 492 U.S. at 429-430. *Brendale*, which involved a dispute over a Tribe's power to zone fee land owned by nonmembers, produced three opinions, none of which garnered a majority. See 492 U.S. at 414 (opinion of White, J.); *id.* at 433 (opinion of Stevens, J.); *id.* at 448 (opinion of Blackmun, J.). The passages that petitioners

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[4] Footnote 16 states:

> Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the [Tribe's] treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State.

450 U.S. at 566.

cite from Justice White's plurality opinion (Pet. 12) and from Justice Stevens' opinion (Pet. 13-14) do not in any way suggest that tribal authority turns on the absence of federal or state remedies. See Pet. App. 11a ("Moreover, in Justice White's and Stevens' opinions, upon which [petitioners] rel[y], there is no suggestion that inherent authority exists only when no other government can act.").

Petitioners are additionally mistaken in suggesting (Pet. 14-16) that *Strate* supports such a test. *Strate* held that a tribal court lacked jurisdiction over a tort case arising from a traffic accident between nonmembers on a state highway. The Tribe had an interest in the dispute because the accident occurred on the portion of the highway built on a federally granted right-of-way across Indian reservation land. 117 S. Ct. at 1415. The Court concluded that the *Montana* test nevertheless was not satisfied because tribal jurisdiction over an accident involving only nonmembers was not "crucial to the 'political integrity, the economic security, or the health or welfare of the [Tribe]'" and was not necessary to protect tribal self-government. *Id.* at 1416. The Court noted that a state judicial forum was available to resolve the dispute, *ibid.*, but it did not suggest that the absence of such a forum would be a precondition for tribal jurisdiction.

In any event, the question here is not when inherent tribal authority over nonmembers should be recognized by a court in the absence of an Act of Congress. Rather, the question is whether EPA reasonably construed and applied an Act of Congress in the circumstances of this case. The CWA does not set forth any such rigid precondition to EPA's treatment of a Tribe in the same manner as a State, and EPA did not

act unreasonably in refraining from imposing one by implication.

d. Petitioners also argue that the Tribes should not be allowed to exercise authority over nonmembers because Montana's water quality laws have not "been preempted with respect to nonmember activities on fee lands on the Reservation." Pet. 17. The question of preemption, however, has no bearing on this case. This case arises from an APA challenge to an agency's action in implementing a federal statute. In assigning EPA the responsibility to determine when Tribes should have TAS authority to establish reservation-wide water quality standards, Congress recognized that a system of "checkerboard" state and tribal water quality standards could undermine the water quality of Indian reservations. See 33 U.S.C. 1377(e); Pet. App. 102a-103a. EPA reasonably looked to this Court's precedents respecting inherent tribal authority over nonmembers in other settings in determining when Tribes should be permitted, under the express statutory authorization in Section 1377(e), to issue water quality standards for CWA purposes that affect waters that pass through or are adjacent to fee lands. EPA then reasonably applied principles from those precedents to decide, based on the administrative record, whether the particular Tribe in this case should be granted certain federal statutory TAS authority.

3. Not only is the court of appeals' decision correct; it also does not conflict with any decision of another court of appeals. Indeed, it is fully consistent with the only other appellate decision addressing an EPA authorization of an Indian Tribe to establish water quality standards. There, the Tenth Circuit upheld EPA's approval of tribal water quality standards and held that EPA had properly incorporated those standards into an

NPDES permit issued to the City's waste treatment facility, which discharged into the Rio Grande at a point above the reservation. *City of Albuquerque* v. *Browner*, 97 F.3d 415, 419, 425-426 (10th Cir. 1996), cert. denied, 118 S. Ct. 410 (1997). The court concluded that EPA's authorization of the Tribe to establish water quality standards for purposes of the CWA "is in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423. See Pet. App. 13a ("Our decision is fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards.").

While failing to mention the *City of Albuquerque* decision, petitioners appear to concede that the court of appeals' decision does not conflict with any decision of another court. Pet. 18. They contend, however, that this Court's review is warranted because the case has broad significance "with respect to future application of the [CWA]'s TAS provision" and "in other situations where the second *Montana* exception is relied upon as a basis for the exercise of inherent tribal authority over nonmembers." Pet. 20. Those contentions, however, do not provide a basis for this Court to exercise its certiorari jurisdiction.

First, EPA has recognized that the question whether a Tribe should be permitted to exercise TAS authority in setting water quality standards must be made "on a Tribe-by-Tribe basis" and depends on the particular circumstances in each case. Pet. App. 99a-100a. As the record in this case demonstrates, EPA conducts a careful inquiry into the particular water resources and land ownership patterns on each reservation. *Id.* at 70a-91a. Petitioners have not challenged below, or even addressed in their petition, EPA's factual findings respecting the Flathead Reservation. Hence, even if it

were this Court's practice to provide guidance on a technical regulatory issue that has generated no conflict among the courts of appeals, this case would be a particularly poor vehicle for addressing EPA's application of the CWA's TAS provisions.

Second, this case has limited precedential value outside of the specific regulatory context here. This case does not involve the judicial articulation of standards governing a Tribe's own assertion of inherent tribal authority over nonmembers on a reservation. Rather, it arises under an Act of Congress that expressly provides for a Tribe to be treated as a State for specified statutory purposes with respect to fee lands within the borders of a State and assigns to a federal administrative agency the responsibility to interpret and apply the statutory provisions in the context of a complex regulatory program. As we have explained, EPA has looked to this Court's precedents respecting inherent tribal authority for guidance on how to carry out its responsibilities under Section 1377(e). EPA has developed principles, by drawing on those cases, for the specific purpose of determining how to implement the congressional directive respecting tribal authority under the CWA. Those principles articulated by EPA, however, have no operative force outside of their regulatory context. Furthermore, EPA has indicated that its treatment of tribal authority issues arising from TAS applications is not set in stone and that it will continue to examine those applications in light of the Supreme Court's evolving case law. Pet. App. 100a. Hence, there is no basis for concluding that this case will have substantial impact in other unrelated situations involving Indian tribal authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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